

No. 3723

8

United States
Circuit Court of Appeals

For the Ninth Circuit.

G. H. BACHENBERG,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Nevada.

Filed

JAN 18 1922

F. D. Monckton,

Clerk.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. M. B. MOORE and C. H. McINTOSH,
Reno, Nevada,

For the Plaintiff in Error.

Honorable WM. WOODBURN, United States At-
torney for the District of Nevada, Reno, Ne-
vada, and Mr. M. A. DISKIN, Assistant U. S.
Attorney for the District of Nevada, Reno,
Nevada,

For the Defendant in Error.

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. H. BACHENBERG,

Defendant.

**Indictment for Violation of National Prohibition
Act.**

United States of America,
District of Nevada,—ss.

Of the February Term of the District Court of
the United States of America, in and for the Dis-
trict of Nevada, in the year of our Lord, one thou-
sand nine hundred and twenty-one.

The Grand Jurors of the United States of America, chosen, selected and sworn, within and for the District of Nevada, in the name and by the authority of the United States of America, upon their oaths, do find and present:

That J. H. Bachenberg, hereinafter called the defendant heretofore, to wit: On or about the 9th day of April, A. D. 1921, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this Court, after the date upon which the 18th Amendment to the Constitution of the United States of America went into effect and before the finding of this Indictment, in violation of Section 3, Title II, of the Act of Congress dated October 28, 1919, known as the "National Prohibition Act," unlawfully, wilfully and knowingly had in his possession intoxicating liquors; [1*] said intoxicating liquors containing one-half of one per centum, or more, of alcohol by volume, and being fit for use for beverage purposes.

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

WM. WOODBURN,
United States Attorney.

Names of witnesses examined before the Grand
Jury on finding the foregoing Indictment:

H. P. BROWN.

*Page-number appearing at foot of page of original certified Transcript of Record.

[Endorsed]: No. 5401. United States District Court, District of Nevada. The United States of America, vs. J. H. Bachenberg, Defendant. Indictment. A true bill, Miles E. North, Foreman. Filed this 25th day of April, A. D. 1921. E. O. Patterson, Clerk. Bail, \$1000.00. Wm. Woodburn, District Atty. [2]

In the United States District Court, District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE BRACKENBURG,

Defendant.

Notice of Motion to Quash.

To the Above-named Plaintiff, and WILLIAM WOODBURN, U. S. District Attorney for the District of Nevada:

You, and each of you, will please take notice that on Wednesday, the 20th day of April, A. D. 1921, at the hour of 3 o'clock P. M., or as soon thereafter as counsel can be heard, that the above-named defendant will move the Commissioner, Anna M. Warren, at her office in the Washoe County Bank Building, in the City of Reno, Washoe County, Nevada, to quash, set aside and hold for naught the search-warrant issued by the said Anna M. Warren, United States Commissioner in and for the District

of Nevada, on the 9th day of April, A. D. 1921, and that said motion will be made and based on the grounds that there was no sufficient affidavit or deposition made, taken or filed with or before said Commissioner showing probable cause of any offense sufficient to warrant the issuance of said search-warrant. That there will be used upon the hearing of said motion the affidavit of P. Nash, made and filed before the said Anna M. Warren, Commissioner aforesaid, on the 9th day of April, 1921, upon which said search-warrant was issued; also [3] the oral testimony of P. Nash, and all of the files in said cause in said Commissioner's court.

Dated this 19th day of April, A. D. 1921.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5401. In the United States District Court, District of Nevada. United States of America, Plaintiff, vs. George Brackenburg, Defendant. Notice of Motion to Quash. Filed April 26, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [4]

In the United States District Court, District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE BRACKENBURG,

Defendant.

Motion to Quash.

Comes now the defendant above-named and moves the Court to quash, set aside and hold for naught the search-warrant issued out of the above-entitled court by Anna M. Warren, one of the Commissioners of said court, on the 9th day of April, A. D. 1921, for the purpose of searching the premises at the corner of Center Street and Commercial Row in the City of Reno, County of Washoe, State of Nevada, known as the Palace Bar, and occupied by the above-named George Brackenberg, for the reason and on the grounds that no sufficient or legal affidavit was made or filed by any person before or with the said Commissioner prior to the issuance of said pretended search-warrant. That no witnesses were examined under oath before said Commissioner and no depositions taken in writing before the said Commissioner before the issuance of said search-warrant, and that no sufficient facts were presented to said Commissioner under oath by affidavit or otherwise, from which the said Commissioner could determine that probable cause existed for the issuance of said search-warrant.

Dated this 19th day of April, 1921.

MOORE & McINTOSH,
Attorneys for Defendant. [5]

[Endorsed]: No. 5401. In the United States District Court, District of Nevada. United States of America, Plaintiff, vs. George Brackenburg, Defendant. Motion to Quash. Filed April 26, 1921.

E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [6]

In the United States District Court for the State
of Nevada.

No. 5401.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE BACKENBURG,

Defendant.

**Notice of Motion for the Return of Property and
to Quash Search-warrant.**

To the Above-named Plaintiff, and WILLIAM
WOODBURN, U. S. District Attorney for the
District of Nevada.

You, and each of you, will please take notice that on Monday, the 2d day of May, A. D. 1921, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, at the United States Federal Postoffice Building, in Carson City, Nevada, in the Courtroom of the said above-entitled District Court, in said building, and before the Honorable E. S. Farrington, Judge of said District Court, the above-named defendant will move the Court for an order directing the return to the said defendant, and to the premises at corner of Center Street and Commercial Row, City of Reno, Washoe County, Nevada, of one bottle containing liquor; and will also move the Court to quash the search-

warrant under which the said premises were searched and said seizure was made by the said officers, on the ground and for the reason as set out in the motion, a copy of which is attached hereto and served herewith; and that upon the hearing of said motion there will be used all of the files and records in said cause, both from the said Commissioner's [7] Court and in this court, and all proceedings had and taken before the said Commissioner; and the oral testimony of P. Nash and H. P. Brown, and the affidavit of said defendant, copy of which is served herewith.

Dated this 29th day of April, A. D. 1921.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5401. In the United States District Court for the State of Nevada. United States of America, Plaintiff, vs. George Backenburg, Defendant. Notice of Motion for the Return of Property and to Quash Search-warrant. Filed May 2, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [8]

In the United States District Court for the State
of Nevada.

No. 5401.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE BACKENBURG,

Defendant.

Motion for the Return of Property and to Quash Search-warrant.

Comes now the defendant above named and moves the Court to return to defendant one bottle containing liquor; said bottle being seized by one P. Nash and H. P. Brown and others unknown to defendant on the 8th day of April, A. D. 1921, and taken from the premises at the corner of Center Street and Commercial Row in the City of Reno, Washoe County, Nevada, which said premises were then and at said time used and occupied by defendant; and also moves the Court to quash that certain search-warrant issued by Anna M. Warren, one of the Commissioners of this court, on or about the 9th day of April, A. D. 1921, upon an affidavit made and filed before said Commissioner by one P. Nash on the 9th day of April, A. D. 1921, for the reason and on the ground that the said search and seizure was made by said persons forcibly and in an unlawful manner, and without the service or notice to defendant that said officers were in possession of a search-warrant; and for the further reason that said search-warrant was illegal and void for the reason that no sufficient or legal affidavit was made or filed by the said P. Nash or any other person before or with the said Commissioner [9] prior to the issuance of said search-warrant; that no witnesses were examined under oath before said Commissioner and no depositions taken in writing before said Commissioner before the issuance of said search-warrant and that no sufficient facts were

presented to the said Commissioner under oath or by affidavit from which the said Commissioner could determine that probable cause existed that an offense was being committed by said defendant or had been committed by said defendant, or that said premises were being used or had been used for unlawful purpose or in violation of the National Prohibition Act, and that all of the acts of the said Commissioner and of the said Nash and Brown in the issuance of or in the service of or search of said premises and seizure of said described property was in violation of defendant's constitutional rights as provided under the Fourth Amendment to the Constitution of the United States, and that the retention of said liquors and the intended use thereof at the trial of defendant in the case now pending against him in this court will be in violation of defendant's constitutional rights as provided under the Fifth Amendment to the Constitution of the United States.

Dated this 29th day of April, A. D. 1921.

MOORE & McINTOSH,

Attorneys for Defendant.

[Endorsed]: No. 5401. In the United States District Court for the State of Nevada. United States of America, Plaintiff, vs. George Backenburg, Defendant. Motion for the Return of Property and to Quash Search-warrant. Filed May 2, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [10]

Affidavit of George H. Bachenberg.

State of Nevada,
County of Washoe,—ss.

George Backenburg, being first duly sworn upon his oath deposes and says: That he is the owner and proprietor of a certain business room and house situate at the corner of Center Street and Commercial Row, in th City of Reno, Washoe County, Nevada, and was in possession thereof on the 9th day of April, A. D. 1921, and that on the evening of said date while defendant was on duty behind the counter in said place of business, one P. Nash and H. P. Brown, Federal Prohibition Enforcement officers in a forcible and violent manner entered affiant's place of business, leaping over the counter, seizing affiant and engaging in a struggle with affiant and overpowering him and overcoming him, and that said persons forcibly and unlawfully and without announcing that they were officers or that they were in possession of a search-warrant to search defendant's premises, and without serving any copy of any search-warrant, or other warrant upon defendant, and in an illegal manner searched said premises and seized and took in their possession, one bottle containing liquor, and not until said officers had so forcibly attacked defendant and so forcibly and unlawfully searched said premises and seized said property did the said officers or either of them present to affiant or any other person any search-warrant or other warrant.

Further affiant saith not.

GEO. H. BACHENBERG.

Subscribed and sworn to before me this 29th day of April, A. D. 1921.

[Seal] M. B. MOORE,
Notary Public in and for Washoe County, State of
Nevada. [11]

Defendant's Exhibit No. 1—Affidavit of P. Nash.
United States of America,
District of Nevada,—ss.

On this 9th day of April, 1921, before me, Anna M. Warren, a United States Commissioner in and for the District of Nevada at Reno, Nevada, personally appeared P. Nash, who being first duly sworn, deposes and says:

That he is and at all times herein mentioned was a Federal Prohibition Enforcement Agent in and for the District of Nevada, and as such makes this affidavit and sets forth the facts, circumstances and conditions hereinafter set forth that heretofore came to the knowledge of and were ascertained by affiant for the purpose of having issued hereon and hereunder a search-warrant; under and pursuant to the provisions of Title II of the Act of Congress approved October 28, 1919, known as the National Prohibition Act respecting the issuance of search-warrants, to search the following described premises, to wit: Premises on the corner of Center Street and Commercial Row in the City of Reno, County of Washoe, State of Nevada, known as the Palace Bar, occupied by John Doe Brockenburg.

That affiant has knowledge and information that in and upon the above-described premises, and since Title II of the said National Prohibition Act went into effect, to wit, after the first day of February, 1920, that intoxicating liquor containing one-half of one per cent or more of alcohol by volume was and is now being manufactured, sold, kept and stored, possessed and bartered, for and fit for beverage purposes, in violation of the said National [12] Prohibition Act and particularly of Section 21 of Title II of said act.

That the facts, circumstances and conditions of which affiant has knowledge and as ascertained by affiant are as follows, to wit: Direct information to affiant by a certain citizen of Reno, whom affiant has known for a long time and whom affiant believes to be absolutely truthful and reliable that liquor is being sold over the bar at said premises and that said informant purchased a drink there on this date; that affiant and agent H. P. Brown have watched said premises and on one occasion saw two parties coming away from said premises under the influence of liquor.

That it will be necessary to search the above-described premises in order to secure for the United States the said intoxicating liquor and apparatus and material for the manufacture of the same, and that it will be impossible to make the said search without the aid and use of a search-warrant, whereupon affiant prays that a search-warrant issue to enter the said premises and there to search for the said intoxicating liquor and apparatus and materials

for the manufacture of the same, pursuant to the statute in such case made and provided.

P. NASH.

Subscribed and sworn to before me this 9th day of April, 1921.

[Seal]

ANNA M. WARREN,
United States Commissioner.

[Endorsed]: No. 5401. U. S. District Court, District of Nevada. The United States vs. G. H. Bachenberg. Defts. Ex. 1. Filed May 2, 1921. E. O. Patterson, Clerk. [13]

[Endorsed]: No. 5401. In the United States District Court for the State of Nevada. United States of America, Plaintiff, vs. George Backenburg, Defendant. Affidavit. Filed May 2, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [14]

SEARCH-WARRANT.

The President of the United States of America, to the United States Supervising Prohibition Enforcement Agent and to His Deputies or Any or Either of Them, GREETING:

WHEREAS, P. Nash, has heretofore, to wit, on the 9th day of April, 1921, filed with me, Anna M. Warren, a United States Commissioner in and for the District of Nevada at Reno, Nevada, in which he states that he is a Federal Prohibition Enforcement Agent in and for the District of Nevada, working under the United States Supervising Prohibition Enforcement Agent at San Francisco, Cali-

fornea; that in and upon those certain premises situate as follows, to wit: Premises on the corner of Center Street and Commercial Row in the City of Reno, County of Washoe, State of Nevada, known as the Palace Bar, occupied by John Doe Brockenburg, that affiant has knowledge and information that in and upon the above described premises there is located and concealed, stored and kept, sold, possessed and bartered and fit for beverage purposes intoxicating liquor containing one-half of one per centum or more alcohol by volume, in violation of the National Prohibition Act and particularly of section 21 of Title II of the said Act.

That it will be necessary to search the above described premises in order to obtain for the United States Government the said intoxicating liquor, and that it will be impossible to make the above mentioned search without the aid and use of a search-warrant, whereupon affiant prays that a search-warrant issue, covering the above-described premises and each and every building on said premises. [15]

NOW, THEREFORE, pursuant to Section 25, Title II of the said National Prohibition Act you are hereby authorized and empowered to enter the above-described premises in the daytime or in the night-time and each and every building on said premises and there to search for the above-mentioned intoxicating liquor which is concealed in violation of the National Prohibition Act, and to seize the said liquor and take the same into your

possession to the end that the said liquor may be dealt with according to law, and to make due return hereof, with a written inventory of the property seized by you or either of you without delay.

WITNESS my hand this 9th day of April, 1921.

ANNA M. WARREN,
United States Commissioner.

[Endorsed]:

Reno, Nev. April 10th, '21.

Make return on within warrant as follows:

Searched premises described within on April 9th,
7:55 P. M.

Seized bottle containing liquor from behind bar.

Arrested proprietor, Geo. H. Bachenberg, who was behind bar at time search was made.

I, P. Nash, the officer serving the within warrant, hereby certify on oath, that the above inventory represents all the property taken under the warrant.

P. NASH, Fed. Pro. Agt. [16]

In the District Court of the United States for the
District of Nevada.

No. 5401.

THE UNITED STATES

vs.

C. H. BACHENBERG.

Verdict.

We, the jury in the above-entitled cause, find

the defendant guilty as charged in the indictment.

Dated May 7th, 1921.

ALFRED MERRITT SMITH,
Foreman.

[Endorsed]: No. 5401. U. S. District Court, District of Nevada. The United States vs. G. H. Bachenberg. Verdict. Filed May 7th, 1921. E. O. Patterson, Clerk. [17]

INDICTMENT FOR VIOL. NATIONAL PROHIBITION ACT.

No. 5401.

THE UNITED STATES

vs.

J. H. BACHENBERG.

Minutes of Court—April 25, 1921—Order for Issuance of Capias.

The grand jury having this day presented a true bill of indictment in this case, it is ordered that a *capias* issue herein returnable forthwith, and that when apprehended, the defendant may be admitted to bail upon giving a good and sufficient bond in the sum of \$1000.00. [18]

INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

J. H. BACHENBERG,

Defendant.

Minutes of Court—April 27, 1921—Arraignment.

This defendant appeared this day with his attorney, Mr. M. B. Moore and was duly arraigned upon the said indictment as provided by law. He declared his true name to be *G. H. Bachenberg* and was granted until Monday next, at 10 A. M. to enter his plea. Upon motion of Mr. Moore, consented to by Mr. Diskin, Asst. U. S. Attorney, it is ordered that the defendant be released upon giving a good and sufficient bond in the sum of One Thousand Dollars, to be approved by A. M. Warren, U. S. Commissioner, before 5 o'clock P. M. of this day, to insure his appearance in this Court when so required.

INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

J. H. BACHENBERG,

Defendant.

Minutes of Court—May 2, 1921—Petition for Return of Property and Motion to Quash.

Mr. M. B. Moore, attorney for the defendant herein, presented, read and argued his petition for the return of certain seized property, and his motion to quash search-warrant. During his argument he presented the affidavit for and the search-warrant used at [19] the time of the seizure, the same were admitted and ordered marked Defts. Ex. No. 1; Mr. M. A. Diskin, Assistant U. S. Attorney, argued in opposition to the petition and motion. At the conclusion of the arguments the matters were ordered submitted.

INDICTMENT FOR VIOL. NATIONAL PROHIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Minutes of Court—May 3, 1921—Order Denying Petition for Return of Property and Motion to Quash.

Ordered that the petition for the return of certain seized property and the motion to quash be, and the same are hereby, denied. To which ruling Mr. M. B. Moore, attorney for defendant, asked and was granted the benefit of an exception.

INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Minutes of Court—May 7, 1921—Trial.

This cause coming on regularly for trial this day; Mr. M. A. Diskin, Assistant U. S. Attorney, appeared on behalf of the plaintiff; Mr. M. B. Moore for the defendant, who was also present, and who entered his plea of not guilty at this time. [20] The following named jurors were accepted by the parties and duly sworn to try the issue, to wit: Wm. Byers, Geo. B. Spradling, Clarence Reudy, John Cosser, Chas. L. Fulstone, John T. Brady, Geo. J. Robsen, E. M. Sullivan, Henry P. Karge, Alfred M. Smith, Chas. J. McGuigan and E. H. Bath. The indictment was read to the jury by the clerk and the plea of the defendant stated. Mr. Diskin waived opening statement on behalf of plaintiff. Mr. Moore at this time objected to any testimony sought to be introduced by the Government for the reason that the evidence was seized upon an unlawful search-warrant. Motion denied and exception allowed. The following named witnesses were duly sworn and testified in support of

the indictment, viz.: H. P. Brown, P. Nash and S. C. Dinsmore; during which testimony a bottle partially filled with liquor was introduced in evidence, ordered admitted, filed and marked "Plffs. Ex. No. 1"; plaintiff rests. No testimony was offered on the part of defendant. Mr. Diskin made his opening argument to the jury, the defendant waived argument, and the jury having been first instructed by the Court, retired in charge of the Marshal to deliberate on the case. No exceptions were taken to the Court's instructions. At 11:50 A. M. the jury returned into court with the following verdict, viz.; "In the District Court of the United States for the District of Nevada. The United States vs. G. H. Bachenberg. No. 5401. We, the jury in the above-entitled cause, find the defendant guilty as charged in the indictment. Dated May 7th, 1921. Alfred Merritt Smith, Foreman," and so they all say. Thereupon it was ordered that the defendant appear for sentence on Tuesday, the 17th instant at ten o'clock A. M. His present bond was deemed sufficient. [21]

INDICTMENT FOR VIOL. NATIONAL PROHIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Minutes of Court—May 13, 1921—Order Continuing Passing of Sentence.

Upon motion of Mr. M. B. Moore, consented to by the U. S. Attorney, it is ordered that the passing of sentence in this case be, and the same is hereby, continued until the 27th instant, at ten o'clock A. M.

INDICTMENT FOR VIOL. NATIONAL PROHIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Minutes of Court—May 27, 1921—Order Continuing Passing of Sentence.

Upon motion of Mr. M. B. Moore, attorney for the defendant herein, and good cause appearing therefor, it is ordered that the time for passing sentence in this case be, and the same is hereby, continued until Monday, June 6th, next. [22]

INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Minutes of Court—June 6, 1921—Sentence.

At this time defendant's motion for a new trial was denied by the Court, and the following sentence was pronounced upon the defendant, who was present with his attorney, Mr. M. B. Moore: It is ordered that the defendant pay to the United States a fine of \$500.00 and that he stand committed to the care of the marshal until the fine and costs incurred herein are paid.

INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

**Minutes of Court—June 6, 1921—Petition for and
Order Allowing Writ of Error.**

On this 6th day of June, A. D. 1921, came the defendant, G. H. Bachenberg, by his attorneys, Messrs. Moore & McIntosh, and filed herein and presented to the Court his petition praying for the allowance of a writ of error and assignment of errors intended to be used by him, praying also that a transcript of the record, testimony, exhibits, stipulations, proceedings and papers duly authenticated, may be sent to the United States Circuit [23] Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises. IN CONSIDERATION WHEREOF, the Court allows a writ of error, upon the defendant, G. H. Bachenberg, giving a bond according to law in the sum of Two Thousand Dollars (\$2,000.00), which shall operate as a supersedeas bond, and that upon the accepting, filing and approval of said bond, the said defendant shall be and he is hereby ordered to be released from custody.

Done in open court, June 6th, 1921.

**INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.**

No. 5401.

THE UNITED STATES,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

**Minutes of Court—June 7, 1921—Order Fixing
Costs.**

Upon stipulation of counsel herein, it is ordered that the costs in this case are hereby fixed at \$52.00.

[24]

**INDICTMENT FOR VIOL. NATIONAL PRO-
HIBITION ACT.**

No. 5401.

THE UNITED STATES

vs.

J. H. BACHENBERG.

**Minutes of Court—July 6, 1921—Order Extending
Time to File Papers in U. S. C. C. A.**

Good and sufficient cause appearing therefor, it is ordered that the defendant herein be, and he hereby is, granted thirty days from and after this dated within which to file his papers on appeal in the United States Circuit Court of Appeals for the Ninth Circuit. [25]

In the District Court of the United States for the
District of Nevada.

May Term, 1921.

Honorable E. S. FARRINGTON, Judge.

No. 5401.

VIOLATION OF NATIONAL PROHIBITION
ACT.

UNITED STATES OF AMERICA

vs.

G. H. BACHENBERG.

Judgment.

This being the time heretofore appointed for passing sentence in this case, the Court pronounced judgment as follows, addressing the defendant:

You, G. H. Bachenberg, have been indicted by the Grand Jury, impaneled in and by this court, for the crime of violating the National Prohibition Act by unlawfully, willfully and knowingly having in your possession intoxicating liquors, said intoxicating liquors containing one-half of one per centum, or more, of alcohol by volume, and being fit for use for beverage purposes; said crime having been committed on the 9th day of April, 1921 at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this court. You were duly arraigned upon that indictment, as required by law, and on being called upon to plead thereto you pleaded not guilty. At a subsequent

day you were placed on trial, by a jury of your own selection, and by the verdict of that jury you were found guilty as charged in the indictment. The defendant was then asked if he had any legal cause to show why the judgment of the Court should not now be pronounced against him. To which he replied that he had not.

In consideration of the law and the premises, it is hereby **ORDERED AND ADJUDGED** that you pay to the United States a fine of Five Hundred (\$500.00) Dollars and costs, and that you stand committed to the care of the marshal until the said fine and costs, taxed at \$——, are paid.

Dated and entered, June 6, 1921.

Attest: E. O. PATTERSON,
Clerk. [26]

In the United States District Court for the District
of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE BACHENBERG,
Defendant.

Praeipie for Transcript of Record.

To E. O. Patterson, Clerk U. S. District Court,
Carson City, Nev.

We hereby request that you have prepared for us copies of the records in the case of the United States vs. George Bachenberg, as follows:

1. Copies of proceedings before the United States Commissioner, Anna M. Warren, including:

- (a) Affidavit for search-warrant.
- (b) Search-warrant.
- (c) Notice of motion to quash search-warrant.
- (d) Motion to quash search-warrant.
- (e) Copy of all testimony taken before said Anna M. Warren, certified, up to the District Court on said motion.
- (f) Copy of any other papers or proceedings not included in the above had or taken before the said Commissioner.

2. Copy of motion made and filed in the United States District Court for the District of Nevada, renewing in said Court the motion made before the Commissioner.

- (a) Copy of notice of motion for the return of property taken under search-warrant.
- (b) Copy of motion for the return of property made and filed in said cause in said U. S. District Court. [27]
- (c) Copy of minutes of clerk of court showing the Court's ruling upon all motions and objections.
- (d) Copy of indictment.
- (e) Complete transcript of testimony and notes taken by stenographer in said cause.
- (f) Copy of verdict of jury.
- (g) Copy of motion for new trial.
- (h) Copy of petition for writ of error.
- (i) Copy of order allowing writ of error.
- (j) Copy of assignment of errors.

- (k) Copy of citation.
- (l) Copy of supersedeas bond.
- (m) Copy of cost bond.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5401. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. George Bachenberg, Defendant. Praeceptum. Filed June 11, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [28]

In the District Court of the United States, in and
for the District of Nevada.

No. 5401.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

G. H. BACHENBERG,
Defendant.

Motion for New Trial.

Comes now the defendant above named and moves the Court that a new trial be granted for the following reasons, and on the following grounds, to wit:

1st. That the Court erred in its decision upon questions of law arising during the course of the trial.

2d. That the verdict of the jury is contrary to law.

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5401. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. H. Bachenberg, Defendant. Motion for New Trial. Filed June 6th, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [29]

In the District Court of the United States, in and for the District of Nevada.

No. 5401.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
G. H. BACHENBERG,
Defendant.

Assignment of Errors.

Comes now the defendant above named, G. H. Bachenberg, and files the following assignment of errors upon which he will rely upon his prosecution of the writ of error in the above-entitled cause from the judgment made and entered by this Honorable Court on the 6th day of June, A. D. 1921.

I.

That the United States District Court for the District of Nevada erred in denying defendant's

motion for new trial made in the above-entitled court and cause on the 6th day of June, 1921, and before the judgment of sentence was pronounced.

II.

That the said Court erred in overruling defendant's objection to the introduction of testimony, made after the jury was impaneled and sworn to try said cause, and before any testimony as to the facts was introduced at said trial.

III.

That the said Court erred in overruling defendant's objection [30] to the admission of the testimony of the witness H. P. Brown, as to what he saw, found and did under the search-warrant referred to in the motion for the return of property made and filed in said cause before the date on which said cause came to trial, said testimony referred to, with questions and answers as follows, to wit:

Q. What, if anything, took place after you went in?

Mr. MOORE.—If the Court please, I do not wish to renew my objection to all these questions, so may it be understood that my objection goes directly now to what took place on the part of this witness, and what he did, and what he found there, so I need not interrupt?

The COURT.—It will be so understood, and you may have an exception.

A. We entered the premises about eight o'clock, and Mr. Bachenberg was down at the end of the bar when we entered, and when he

saw us come in the door he made a run for this end of the bar.

Mr. DISKIN.—(Q.) That is, the front end of the bar?

A. The front end of the bar; and I jumped over the bar and caught him as he was coming by, and he made a kick at the bottle which was on the floor alongside of a hole, and he kicked the bottle over, but it didn't go down the hole; he and I had a little tussle there, and he went to the floor, and Mr. Nash came over, and Mr. Nash stated to me to let him up, that he had destroyed the evidence; when I let him up he made a run for the hole in the floor, and the bottle was about four feet then from the hole in the floor, and he stamped on the bottle, and tried to destroy the evidence; and I grabbed him again and pulled him away from there, and he hollered at one of the outsiders, outside of the bar, to jump over [31] the bar and destroy that evidence, and the party that he hollered to made an effort to jump over the bar, and was stopped by one of the outside officers, the chief of police.

Q. You say there was a hole back of the bar?

A. Yes, sir. I should judge about ten inches square, in the floor leading down to the cellar.

Q. And how far was the bar from this hole, would you say?

A. From the bar, it was right underneath the bar, the back-bar, or the drain-board, rather.

Q. It was near the drain-board?

A. Yes, sir, underneath the drain-board.

Q. With reference to whether or not this hole was in the center of the bar, what would you say?

A. Well, it was more toward the end of the bar, a little over the average would be toward the end of the bar, toward the office.

Q. Did you make any investigation of the portion of the cellar under the hole?

A. Yes, sir.

Q. And what, if anything, did you see?

A. There was a large pile of rocks right directly under the hole in the floor.

Q. Now, you say when you went in there first Mr. Bachenberg was down at the end of the bar?

A. At the further end of the bar, serving some drinks down there.

Q. And you jumped over the bar immediately, did you?

A. Not till he made a run to come up toward this end of the bar; then I jumped over and met him.

Q. In that effort that you made, would you say it was a run or a fast walk?

A. A run. [32]

Q. And where did you after that locate the bottle?

A. On the floor, about four feet from the hole, lying on its side.

Q. Do you know what became of the bottle?

A. Yes, sir; Mr. Nash picked the bottle up.

Q. How long do you think you tussled with the defendant?

A. Oh, I don't know; about fifteen or twenty seconds. I had two tussles with him.

Q. You let him up after the first tussle?

A. Mr. Nash said that he had destroyed the evidence, and I let him up, and he made a run then for the bottle, and tried to destroy it with his feet.

Q. What sort of an effort did he make with his feet?

A. Jumped on top of the bottle two or three times; then I pulled him away from it, and told Mr. Nash to get the bottle.

Q. What you have testified to occurred at Reno, Washoe County, Nevada, did it?

A. Yes, sir.

Mr. DISKIN.—Cross-examine.

IV.

That the said Court erred in overruling defendant's objection to the testimony of P. Nash as to what he saw, found and did under the search-warrant referred to in the motion for the return of property made and filed in said cause before the date on which the said cause came to trial, said testimony referred to with questions and answers, as follows:

Q. Was anyone in there at that time?

A. Yes, sir; possibly—I think there must have been twenty or thirty people at least; the lower end of the bar, there were at least— [33]

Mr. MOORE.—Just a moment. If the Court

please, in order that I may have my record correct, I object to any testimony on the part of this witness as to what he did or what he saw, basing my objection on the same grounds I have hitherto stated in the objection to the testimony of the other witness, and the general objection to the introduction of any testimony.

The COURT.—It will be the same ruling, and the same exception.

WITNESS.—(Contg.) Four or five customers, I presume, standing in front of the bar. When I say the lower end of the bar I mean the end of the bar next to Commercial Row.

Mr. DISKIN.—(Q.) Where was the defendant?

A. He was at the upper end of the bar.

Q. What, if anything, did you do after you entered the place?

A. Why, I tried—the first thing that we saw when we saw the defendant, he recognized us.

Mr. MOORE.—I object to that, that “he recognized us,” as a conclusion of the witness.

The COURT.—That may go out.

WITNESS.—As we came in the door, the first notice that we saw the defendant was his quick actions, leaving the place where he was serving a customer at the upper end, and starting down toward the lower end of the bar, on a run. Due to the fact that there was these parties in front of the bar I spoke of, we had quite a little—it was quite hard for us to get over

the bar; in fact, I made two endeavors on my own part to get over before I got over the bar.

Mr. DISKIN.—(Q.) Who went over the bar first, you or Mr. [34] Brown?

A. Brown went over the bar first; I was hindered from going over; I made two tries, and then I lit on my head, I think.

Q. When Mr. Brown got over where was the defendant?

A. He was running down the inside.

Q. On the inside of the bar? A. Yes.

Q. What happened after Brown got over the bar?

A. Brown and the defendant met—oh, I don't know, two or three or four feet from where this hole was, where the bottle was; and when I got to my feet I looked where this bottle was, in the expectation of seeing the bottle, and I didn't see it there; Mr. Brown had the defendant, grappling with him at that time, and they were mixed in behind the bar there; in fact, I believe they were down on the floor, both of them; I am not positive of that, either that or very near the floor; I told Brown to let him up, that the evidence was gone; I gave one look at this hole and didn't see any bottle; and I said, "Let him up, the evidence is gone"; and Brown released him, and without saying a word he brushed past me, and started to stamp on this bottle, and we both of us together grappled him at that time, but I released him and tried to pick up the bottle.

Q. Where did you first see the bottle?

A. Laying on the floor, flat, not standing up, but laying on the floor flat, and possibly from four to six feet away from where the hole was.

Q. Now, in this second tussle did you hear the defendant make any remark of any kind?

A. Yes, sir; I heard him call out two or three times, "Jump over the bar and break the bottle," or words to that effect; or "Come over the bar and break the bottle"; the idea was, of course, that [35] he was calling to somebody on the outside of the bar to destroy the evidence.

Mr. MOORE.—I move that be stricken out, after the word "idea."

The COURT.—That may go out.

Mr. DISKIN.—No objection.

The COURT.—Just the last part of it, the idea.

Mr. DISKIN.—(Q.) Did you examine that hole? A. Yes, sir.

Q. How large a hole was it?

A. Oh, I should judge around ten inches square, something in that nature.

Q. And where was it in reference to the drain-board?

A. Oh, the drain-board, right directly—in close proximity to the drain-board; I would not like to say as to the number of inches, or anything of that nature; the only time I ever saw it was that night; I didn't measure it with a tapeline, or anything of that kind.

Q. Did you make any investigation of the cellar or basement? A. I did.

Q. What, if anything, did you find in this hole?

A. Directly under this hole was a locked compartment or room, possibly eight or ten feet square, with a padlocked door; the defendant opened this door with his key, and in this compartment was this pile of rocks directly under the hole.

Q. What became of the bottle, Mr. Nash, which you have testified to, or saw in the defendant's premises?

A. I took it in my possession; sealed it at the police station, put the seal on it and labeled it, and then delivered it personally to Professor Dinsmore that evening. [36]

Q. Prior to the time you took the bottle and delivered it to Professor Dinsmore, was it always in your possession?

A. Either in my possession, or Mr. Brown's.

Q. Would you be able to identify the bottle?

A. I would.

Q. Will you examine that bottle and its contents? (Hands to witness.)

A. That is the same bottle, with my writing on it, on the label, with my initials and Mr. Brown's initials. I know it by the label; know it also by the fact of this seal that was placed on it that evening; the wax seal we placed on it underneath Professor Dinsmore's seal.

Q. From the time you received that bottle

until you delivered it to Professor Dinsmore, did you put anything in the bottle?

A. I did not.

Q. And the substance that was in the bottle at the time you seized it and at the time you delivered it to Professor Dinsmore was absolutely the same?

A. Absolutely. I did taste the liquor in the bottle, I think it was in the police station; but at no time had the bottle been out of our custody. I tasted it up there; it was liquor.

Q. You are familiar with the taste of liquor?

A. I am.

Q. From the examination you made of the contents of this bottle, can you say whether this was liquor, or not?

A. I can swear that is some sort of whiskey.

Mr. DISKIN.—I offer the bottle in evidence.

Mr. MOORE.—Object on the same grounds we have heretofore imposed to all this line of testimony, if the Court please.

The COURT.—It will be the same ruling and the same exception.

Mr. DISKIN.—Cross-examine. [37]

V.

That the said Court erred in refusing to permit counsel for the defendant to inquire of the said Percy Nash as to his actual knowledge of the alleged facts and statement made in the affidavit upon which the said search-warrant is based, as appears from the transcript as follows, to wit:

Q. And you had prior to that time, had you—

The COURT.—I don't know about going into this thing. I have already pronounced that search-warrant valid; and if there is any mistake, it is my mistake, and not a matter that the jury can pass on now.

Mr. MOORE.—I am quite well aware of that fact, if the Court please; and I will state clearly that the only purpose I have in going into this matter at this time, is for the purpose of my record, and as the basis, further, of making a motion in a few minutes, after I have completed Mr. Nash's cross-examination. I will state to your Honor, so it will save time—I don't think it will prejudice the jury at all—that the question I wish to ask him is as to whether or not this other instrument I hold is the affidavit that he made before Mrs. Warren, which is the basis of this search-warrant, and whether or not it is the only affidavit that he made.

The COURT.—You brought this matter up on motion, and the petition was filed, was it not? At any rate, the proceeding was brought before me, and you had ample opportunity then to introduce any evidence you wished. I passed on the matter, and held that the warrant was good. Now if the testimony is introduced before the jury, what shall I instruct the jury? Shall I [38] instruct them they are now to pass on the same question I have already passed on? Are they to determine whether this is a valid

warrant or not, and whether there was probable cause? Under any theory of the case I don't think that can come before the jury at this time; and, furthermore, under the Weeks case and the Adams case, it is hardly proper to stop in the course of a trial to determine whether the search-warrant is regular or not, particularly after the matter has been gone into before the trial, and counsel have had opportunity to have it determined.

Mr. MOORE.—As I stated, the only purpose of this cross-examination was for the basis of a motion, which is to strike the testimony of both these witnesses from the record, and all of it, relative to the search and seizure made there.

The COURT.—I don't think I shall permit it now. You have had your opportunity already, and I do not think we can stop to go into those matters now.

Mr. MOORE.—We reserve an exception to the Court's ruling.

The COURT.—You may have the exception. If this were the only case where that question would come up, possibly I would permit it, but there are a great many cases of this kind; and if the question is to be tried once before the Judge and another time before the jury, it is going to take a great deal of time, and I do not like to set the precedent. Counsel will always have ample opportunity before the trial to raise all those questions, and they can be passed on by the Court. The question has been raised

already; it is one purely for the Judge to pass on, and not for the jury, and the rule hereafter will be that all [39] questions of that kind must be disposed of before the trial.

Mr. MOORE.—Well, I will state to the Court, that the Court has disposed of them with the exception of this one.

The COURT.—You had ample opportunity to bring it up before.

Mr. MOORE.—I could not bring it up on motion to strike the testimony out.

The COURT.—You have had ample opportunity to bring out all these facts, every one of them, on the question as to whether there was probable cause or not. I, however, do not wish to be understood as saying that the motion and the papers that were presented were sufficient to bring up all those questions, but there was no reason why you should not have brought them all up.

Mr. MOORE.—I think that is all.

VI.

That the said Court erred in overruling defendant's motion to strike out the testimony of the witness Nash and the witness Brown, said motion being as follows, to wit:

Mr. MOORE.—Now, if the Court please, in order to have my record complete as I view it, I move that the testimony of Mr. Brown and Mr. Nash relative to what occurred in the premises this evening at the time they made the search be stricken from the record, for the

reason it now appears that it was secured in an unlawful and illegal manner, basing my motion upon the files and records in this case, and upon the testimony now given by the officers.

The COURT.—The motion is overruled, and you may have an exception. [40]

Mr. MOORE.—We note an exception.

VII.

That the said Court erred in overruling defendant's objection to the testimony of S. C. Dinsmore, witness for the Government, said objection being as follows, to wit:

Mr. MOORE.—Just a moment. If the Court please; I object to any testimony from this witness relative from whom he received that bottle, or as to what he did with it, or in any connection, basing it upon the motions and objections heretofore made.

The COURT.—It will be the same ruling and same objection. Proceed.

VIII.

That the Court erred in overruling defendant's motion made in said cause, in which the defendant renewed the motion made before the Commissioner, Anna M. Warren, to quash, set aside and hold for naught the search-warrant issued by Anna M. Warren on the 9th day of April, A. D. 1921.

IX.

That the said Court erred in overruling defendant's motion and offer of testimony made in this cause to quash the search-warrant issued by Anna M. Warren, United States Commissioner, in and

for the District of Nevada, on the 9th day of April, A. D. 1921, and for the return to the defendant of the property taken under said search-warrant for the reasons stated in said motion and also to the offer of testimony made by the defendant upon the hearing of said motion.

BY REASON WHEREOF, plaintiff in error prays that the judgment aforesaid be reversed and the cause remanded to the [41] trial court with instructions to the trial court to quash the search-warrant in said action and for such other and further proceedings as may be proper in the premises.

Respectfully submitted:

MOORE & McINTOSH,
Attorneys for Defendant.

[Endorsed]: No. 5401. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. H. Bachenberg, Defendant. Assignment of Errors. Filed June 6, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [42]

In the District Court of the United States, in and for the District of Nevada.

No. 5401.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Petition for Writ of Error.

To the Honorable E. S. FARRINGTON, Judge of the District Court of the United States, for the District of Nevada.

Now comes G. H. Bachenberg, the defendant in the above-entitled cause, and feeling himself aggrieved by the verdict of the jury and the judgment of the District Court of the United States for the District of Nevada, made and entered on the 6th day of June, A. D. 1921, hereby petitions for an order allowing him, said defendant, to prosecute a writ of error to the United States Circuit Court of Appeals of the Ninth Circuit from the District Court of the United States for the District of Nevada, and also prays the Court that a transcript of the record, testimony, exhibits, stipulation, proceedings and papers, duly authenticated, may be prepared and sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that said writ of error may be made a supersedeas and that your petitioner be released on bail in an amount to be fixed by the Judge of said District Court pending the final disposition of said writ of error.

[43]

Assignment of errors is filed with this petition.

MOORE & McINTOSH,

His Attorneys.

[Endorsed]: No. 5401. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. H. Bach-

emberg, Defendant. Petition for Writ of Error. Filed June 6, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [44]

In the District Court of the United States, in and for the District of Nevada.

No. 5401.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Order Allowing Writ of Error.

On this 6th day of June, A. D. 1921, came the defendant, G. H. Bachenberg, by his attorneys, Messrs. Moore & McIntosh, and filed herein and presented to the Court his petition praying for the allowance of a writ of error and assignment of errors intended to be used by him, praying also that a transcript of the record, testimony, exhibits, stipulations, proceedings and papers, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises.

IN CONSIDERATION WHEREOF, the Court allows a writ of error, upon the defendant, G. H. Bachenberg, giving a bond according to law in the sum of Two Thousand Dollars (\$2,000.00) which

shall operate as a supersedeas bond, and that upon the accepting, filing and approval of said bond, the said defendant shall be and he is hereby ordered to be released from custody.

Done in open court this 6th day of June, A. D. 1921.

E. S. FARRINGTON,

District Judge. [45]

[Endorsed]: No. 5401. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. H. Bachenberg, Defendant. Order Allowing Writ of Error. Filed June 6, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [46]

In the District Court of the United States, in and for the District of Nevada.

No. 5401.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Bail Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, J. H. Bachenberg, of the County of Washoe, State of Nevada, as principal, and Sam Pickett, and Bert Baroni, of the County of Washoe, State of Nevada, as sureties, are held and firmly

bound unto the United States of America, in the full and just sum of Two Thousand Dollars (\$2000.00), to be paid to the United States of America, to which payment well and truly *be* made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 6th day of June, in the year of our Lord, one thousand nine hundred and twenty-one.

WHEREAS, lately on the 6th day of June, A. D. 1921, at a term of the District Court of the United States for the District of Nevada, in a cause pending in said court between the United States of America, plaintiff, and G. H. Bachenberg, defendant, a judgment and sentence was rendered against said defendant as follows, to wit:

The said G. H. Bachenberg to be fined in the sum of Five [47] Hundred Dollars (\$500.00), together with costs of suit.

WHEREAS, the said G. H. Bachenberg obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court for the District of Nevada, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the said court 30 days from and after the date thereof, which citation has been fully served.

Now, the condition of said obligation is such, that if the said G. H. Bachenberg shall prosecute said writ of error to effect, and shall appear in person

in the United States Circuit Court of Appeals for the Ninth Circuit, when said cause is reached for argument or when required by law or rule of said court, and from day to day thereafter in said court until such cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the said Court of Appeals, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States for the District of Nevada, on such day or days as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals, then the above obligation to be void; otherwise to remain in full force, virtue and effect. [48]

GEO. H. BACHENBERG, (Seal)
Principal.

S. M. PICKETT, (Seal)
Surety.

BERT BARONI, (Seal)
Surety.

State of Nevada,
County of Washoe,—ss.

S. M. Pickett and Bert Baroni, sureties on the annexed foregoing undertaking, being first duly sworn, each for himself and not one for the other, deposes and says: That he is a resident and free-

holder within the County of Washoe, State of Nevada; and that he is worth the sum of Two Thousand Dollars (\$2000.00) over and above all his just debts and liabilities, in property not exempt from execution.

S. M. PICKETT.
BERT BARONI.

Subscribed and sworn to before me this 6th day of June, 1921.

[Seal] ANNA M. WARREN,
United States Commissioner for the District of Nevada.

[Endorsed]: No. 5401. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. H. Bachenberg, Defendant. Bail Bond on Writ of Error. Approved this 7th day of June, 1921. E. S. Farrington, Dist. Judge. Filed June 7th, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [49]

In the United States District Court for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEO. BACHENBERG,
Defendant.

Bond on Writ of Error.

WHEREAS the defendant in the above-entitled action has sued out a writ of error through the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court for the District of Nevada, from a judgment made and entered against him in said above-entitled cause in said United States District Court for the District of Nevada on the 6th day of June, A. D. 1921, or thereabouts; and

WHEREAS, the said defendant by an order of Court heretofore duly made and entered is required to enter into a bond in the sum of Five Hundred Dollars (\$500.00) to guarantee the payment of all costs in said cause.

NOW, THEREFORE, in consideration of the premises and of the suing out of said writ of error to the said Court of Appeals for the Ninth District of the United States, we, the undersigned, residents of the County of Washoe, State of Nevada, do hereby jointly and severally undertake and promise on the part of the said Geo. Bachenberg that the said person will pay all damages and costs which may be awarded against him on account of the said writ of error or on the dismissal thereof, not exceeding the sum of [50] Five Hundred Dollars (\$500.00), in which amount we acknowledge ourselves jointly and severally bound.

WITNESS our signature this 28th day of June, A. D. 1921.

ALBERT A. BARONI.
S. M. PICKETT.

State of Nevada,
County of Washoe,—ss.

Albert A. Baroni and S. M. Pickett, each for himself and not one for the other, being first duly sworn, deposes and says: That he is a resident and householder of the County of Washoe, State of Nevada, and is the same identical person who signed the above and foregoing bond and undertaking; and that he is worth the sum of One Thousand Dollars (\$1000.00) over and above all indebtedness and in property subject to execution.

ALBERT A. BARONI.

S. M. PICKETT.

Subscribed and sworn to before me this 28th day of June, A. D. 1921.

[Seal]

M. B. MOORE,

Notary Public in and for Washoe County, State of Nevada.

My commission expires April 23, 1923.

[Endorsed]: No. 5401. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. Geo. Bachenberg, Defendant. Bond. Approved June 28th, 1921. E. S. Farrington, Dist. Judge. Filed June 28th, 1921. E. O. Patterson, Clerk. Moore & McIntosh, Attorneys at Law, Reno, Nevada. [51]

In the District Court of the United States, in and
for the District of Nevada.

No. 5401.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. H. BACHENBERG,

Defendant.

Testimony.

This case came on for trial in the above-entitled court on Saturday, May 7th, 1921, at 10 o'clock A. M. of said day, before the Honorable E. S. Farrington, Judge of said Court, and a jury, a jury having been duly and regularly impaneled and sworn to try said case.

Mr. M. A. Diskin, Assistant United States Attorney, appearing as attorney for plaintiff, and Messrs. Moore & McIntosh appearing as attorneys for the defendant.

Whereupon, after the reading of the indictment by the Clerk, the following proceedings were had and testimony introduced: [52]

Mr. DISKIN.—We waive our opening statement, and call Mr. Brown.

Mr. MOORE.—If the Court please, at this time I object to the introduction of any testimony on the part of any witness as to what was done and what was found or seized in the premises occupied by this defendant in Reno, and as described in the affidavit and in the search-warrant, which are a part

of the records in this case, on the grounds that the evidence, and all the evidence on the part of the Government, was secured by reason of an illegal and unlawful search of the defendant's premises, and of his property; that there was no valid or sufficient affidavit filed with the magistrate, or commissioner who issued the search-warrant in question, or showing that probable cause existed that any crime had been, and was being committed, and that the evidence in the possession of the Government in this case was secured in violation of the constitutional rights of this defendant, as provided in the Fourth Amendment to the Constitution of the United States; and that its admission in testimony here will be in violation of the Fifth Amendment to the Constitution of the United States.

I base this upon the motion in the case, and the proceedings heretofore had. I understand the Court has ruled on that.

The COURT.—I have heretofore passed on that.

Mr. MOORE.—The Court denies my motion?

The COURT.—Certainly. I have already passed on that. In my opinion, the warrant complies with the statute, and with the Constitution. I do not think it invades any of the defendant's rights; and it seems to me there was sufficient positive [53] testimony given by the affiant himself as to what he had seen and heard, in addition to what had been told him and sworn to, by a reputable citizen, to justify the issuance of the warrant, and to establish probable cause.

Mr. MOORE.—We note an exception to the ruling of the Court.

Testimony of H. P. Brown, for the Government.

Mr. H. P. BROWN, called as a witness on behalf of the Government, after being sworn, testified as follows:

Direct Examination by Mr. DISKIN.

Q. Your initials, please, Mr. Brown? A. H. P.

Q. You are a prohibition enforcement agent?

A. Yes, sir.

Q. You were such officer on the 9th of April, 1921? A. Yes, sir.

Q. Do you know the defendant in this case, J. H. Bachenberg? A. Yes, sir.

Q. Do you know what business the defendant was engaged in on or about the 9th of April, 1921?

A. He ran a soft drink establishment known as the Palace Bar.

Q. Where is that situated?

A. On the corner of Commercial Row, and I don't know the other street; the street the Golden Hotel is on, I don't know the name of the street.

Q. Center Street? A. Center Street.

Q. Did you enter those premises on the 9th of April, 1921? A. Yes, sir.

Q. Who was with you? A. Mr. Nash. [54]

Q. What, if anything, took place after you went in?

Mr. MOORE.—If the Court please, I do not wish to renew my objection to all these questions, so may it be understood that my objection goes directly now to what took place on the part of this witness,

(Testimony of H. P. Brown.)

and what he did, and what he found there, so I need not interrupt?

The COURT.—It will be so understood, and you may have an exception.

A. We entered the premises about eight o'clock, and Mr. Bachenberg was down at the end of the bar when we entered, and when he saw us come in the door he made a run for this end of the bar.

Mr. DISKIN.—(Q.) That is, the front end of the bar?

A. The front end of the bar; and I jumped over the bar and caught him as he was coming by, and he made a kick at the bottle which was on the floor alongside of a hole, and he kicked the bottle over, but it didn't go down the hole; he and I had a little tussle there, and he went to the floor, and Mr. Nash came over, and Mr. Nash stated to me to let him up, that he had destroyed the evidence; when I let him up he made a run for the hole in the floor, and the bottle was about four feet then from the hole in the floor, and he stamped on the bottle, and tried to destroy the evidence; and I grabbed him again and pulled him away from there, and he hollered at one of the outsiders, outside of the bar, to jump over the bar and destroy that evidence, and the party that he hollered to made an effort to jump over the bar, and was stopped by one of the outside officers, the chief of police.

Q. You say there was a hole back of the bar?

A. Yes, sir. [55]

Q. How large a hole was it?

(Testimony of H. P. Brown.)

A. I should judge about ten inches square, in the floor leading down to the cellar.

Q. And how far was the bar from this hole, would you say?

A. From the bar, it was right underneath the bar, the back-bar, or the drain-board, rather.

Q. It was near the drain-board?

A. Yes, sir, underneath the drain-board.

Q. With reference to whether or not this hole was in the center of the bar, what would you say?

A. Well, it was more toward the end of the bar, a little over the average would be toward the end of the bar, toward the office.

Q. Did you make any investigation of the portion of the cellar under the hole? A. Yes, sir.

Q. And what, if anything, did you see?

A. There was a large pile of rocks right directly under the hole in the floor.

Q. Now you say when you went in there first Mr. Bachenberg was down at the end of the bar?

A. At the further end of the bar, serving some drinks down there.

Q. And you jumped over the bar immediately, did you?

A. Not till he made a run to come up toward this end of the bar; then I jumped over and met him.

Q. In that effort that you made, would you say it was a run or a fast walk? A. A run.

Q. And where did you after that locate the bottle?

(Testimony of H. P. Brown.)

A. On the floor, about four feet from the hole, lying on its side. [56]

Q. Do you know what became of the bottle?

A. Yes, sir; Mr. Nash picked the bottle up.

Q. How long do you think you tussled with the defendant?

A. Oh, I don't know; about fifteen or twenty seconds. I had two tussles with him.

Q. You let him up after the first tussle?

A. Mr. Nash said that he had destroyed the evidence, and I let him up, and he made a run then for the bottle, and tried to destroy it with his feet.

Q. What sort of an effort did he make with his feet?

A. Jumped on top of the bottle two or three times; then I pulled him away from it, and told Mr. Nash to get the bottle.

Q. What you have testified to occurred at Reno, Washoe County, Nevada, did it? A. Yes, sir.

Mr. DISKIN.—Cross-examine.

Cross-examination.

Mr. MOORE.—(Q.) You and Mr. Nash are both Federal prohibition enforcement officers?

A. Yes, sir.

Q. What time in the day or night was it when you went there?

A. Eight o'clock in the evening.

Q. Eight o'clock at night, after dark?

A. Yes, sir, just after dark.

Q. A good many people in the place, were there?

A. Quite a few.

(Testimony of H. P. Brown.)

Q. How many people were down at the lower end of the bar where Mr. Bachenberg was?

A. I could not swear.

Q. Did you notice what sort of drinks he was serving there? [57]

A. No, sir, I did not.

Q. When you went in did either you or Mr. Nash say anything to him, or any one else?

A. No, sir, didn't have time.

Q. You went in pretty fast yourself, didn't you?

A. No, sir, I walked right in the front door, but I got pretty fast when I saw the defendant make a run.

Q. And when you saw him coming up, as you say on the run, towards the other end of the bar, did you say anything to him then?

A. No, sir, I hopped over the bar.

Q. You jumped over the bar? A. Yes, sir.

Q. Did Mr. Nash say anything to you?

A. No, sir.

Q. Did either one of you tell him you were officers, or had a search-warrant?

Mr. DISKIN.—That is objected to as immaterial, and not proper cross-examination; it does not tend to prove any issue in the case.

Mr. MOORE.—If the Court please, under a recent ruling of the Supreme Court of the United States this examination is perfectly proper; the case of *United States vs. Amos*, in which the facts were brought out, and everything that was done, and the fact that there was no search-warrant in the pos-

(Testimony of H. P. Brown.)

session of the officers at the time they made the search, and the court characterizes it as proper cross-examination.

The COURT.—Do you contend there was no search-warrant in the possession of the officers at this time?

Mr. MOORE.—No, I have admitted here, and the record shows they had a paper.

The COURT.—How does the Amos case fit this one? [58]

Mr. MOORE.—Upon this point, if the Court please: As I have heretofore expressed myself to the Court, it is my contention before the officers may make a search of a man's business or home, they must declare they have a search-warrant, that they are officers, and present a copy of the warrant to the party in possession; and it is upon that point that I desire to introduce this testimony.

The COURT.—Well, I will let you ask that question; but when I do so I want to say I think it is immaterial. I will allow you to ask it because it is a part of the *res gestae*; but if it is ever established as the law that when an officer goes into a place to make a search or to make an arrest, that he can not arrest the man, no matter what he is doing, that he cannot make a search, that he cannot seize the evidence, until he approaches the defendant and announces that he has a warrant, I think the officers may just about as well stay at home. I have never seen any such authority, and if you can find one I should be very glad to see it. The authorities

(Testimony of H. P. Brown.)

that I have seen on the subject simply state that an officer is not bound to wait until the evidence is destroyed before he announces that he has a search warrant.

Mr. MOORE.—What was the question, please?
(The reporter reads the question.)

A. Not at that time, at that particular moment. He knows who we are.

Mr. MOORE.—I object to that as a conclusion of the witness.

The COURT.—That may go out.

Mr. MOORE.—(Q.) At the time you jumped over the bar and [59] seized him, did you tell him you were there to search his premises, and for him to stop?

A. I believe Mr. Nash said something, I didn't.

Q. What did you say?

A. I didn't say a word, not for a few seconds; I was too busy.

Q. Did you say anything to him until after you had the second tussle with him, as you say you had?

A. I don't believe I did.

Q. Which one of you had the search-warrant in your possession? A. I didn't have it.

Q. You were aware that Mr. Nash had a warrant with him? A. Yes, sir.

Q. And you preceded Mr. Nash, did you, in the operations? A. Yes, sir.

Q. After you had jumped over the bar and grappled with the defendant, then Mr. Nash also followed you and assisted you?

(Testimony of H. P. Brown.)

A. Yes, sir; I guess he came over the bar, I could not testify that he did.

Mr. MOORE.—I think that is all.

Redirect Examination.

Mr. DISKIN.—(Q.) Did you know the defendant Bachenberg prior to the time you entered the saloon on this day? A. Yes, sir.

Q. How long had you known him?

A. Oh, I had known him for a year and a half or two years.

Q. Do you know whether or not he knew you were an enforcement officer?

Mr. MOORE.—I object to that on the ground it calls for [60] a conclusion of the witness whether he knew. He may ask if he had ever told him so.

The COURT.—If you want to bring that out you had better draw out the facts.

Mr. MOORE.—I also object to it as irrelevant and immaterial.

Mr. DISKIN.—(Q.) Did you have any conversation with Mr. Bachenberg prior to this time, Mr. Brown? A. No, sir.

Mr. DISKIN.—That is all.

Mr. MOORE.—(Q.) Had you ever been in his place? A. No, sir.

Mr. MOORE.—That is all.

Testimony of P. Nash, for the Government.

Mr. P. NASH, called as a witness on behalf of the Government, after being sworn, testified as follows:

Direct Examination by Mr. DISKIN.

Q. You are a prohibition enforcement officer, Mr. Nash? A. Yes, sir.

Q. And you were on the 9th day of April, 1921?

A. Yes, sir.

Q. Do you know the defendant in this case, J. H. Bachenberg? A. I do.

Q. What business was he engaged in on the 9th of April, 1921?

A. He had a soft drink place on the corner of Commercial Row and Center Street, called the Palace Bar.

Q. In the City of Reno?

A. In the City of Reno.

Q. Do you know how many entrances there were to that bar? [61]

A. The only one I noticed was one on the corner; there may be a side door.

Q. Off of Center Street?

A. Right on the corner of Center and Commercial Row.

Q. Did you have occasion to enter those premises on the 9th of April, 1921? A. I did.

Q. Who was with you? A. Mr. Brown.

Q. Through what door did you go?

A. This main entrance right off the corner.

(Testimony of P. Nash.)

Q. Was anyone in there at that time?

A. Yes, sir; possibly—I think there must have been twenty or thirty people at least; the lower end of the bar, there were at least—

Mr. MOORE.—Just a moment. If the Court please, in order that I may have my record correct, I object to any testimony on the part of this witness as to what he did or what he saw, basing my objection on the same grounds I have hitherto stated in the objection to the testimony of the other witness, and the general objection to the introduction of any testimony.

The COURT.—It will be the same ruling, and the same exception.

WITNESS.—(Contg.) Four or five customers, I presume, standing in front of the bar. When I say the lower end of the bar I mean the end of the bar next to Commercial Row.

Mr. DISKIN.—(Q.) Where was the defendant?

A. He was at the upper end of the bar.

Q. What, if anything, did you do after you entered the place? [62]

A. Why, I tried—the first thing that we saw when we saw the defendant, he recognized us.

Mr. MOORE.—I object to that, that “he recognized us,” as a conclusion of the witness.

The COURT.—That may go out.

WITNESS.—As we came in the door, the first notice that we saw the defendant was his quick actions, leaving the place where he was serving a customer at the upper end, and starting down to—

(Testimony of P. Nash.)

ward the lower end of the bar, on a run. Due to the fact that there was these parties in front of the bar I spoke of, we had quite a little—it was quite hard for us to get over the bar; in fact, I made two endeavors on my own part to get over before I got over the bar.

Mr. DISKIN.—(Q.) Who went over the bar first, you or Mr. Brown?

A. Brown went over the bar first; I was hindered from going over; I made two tries, and then I lit on my head, I think.

Q. When Mr. Brown got over where was the defendant?

A. He was running down the inside.

Q. On the inside of the bar? A. Yes.

Q. What happened after Brown got over the bar?

A. Brown and the defendant met—oh, I don't know, two or three or four feet from where this hole was, where the bottle was; and when I got to my feet I looked where this bottle was, in the expectation of seeing the bottle, and didn't see it there; Mr. Brown had the defendant, grappling with him at that time, and they were mixed in behind the bar there; in fact, I believe they were down on the floor, both of them; I am not positive of that, either that or very near the floor; I told Brown to let him up, [63] that the evidence was gone; I gave one look at this hole and didn't see any bottle; and I said, "Let him up, the evidence is gone"; and Brown released him, and without saying a word he brushed past me, and started to

(Testimony of P. Nash.)

stamp on this bottle, and we both of us grappled him at that time, but I released him and tried to pick up the bottle.

Q. Where did you first see the bottle?

A. Laying on the floor, flat, not standing up, but laying on the floor flat, and possibly from four to six feet away from where the hole was.

Q. Now, in this second tussle did you hear the defendant make any remark of any kind?

A. Yes, sir, I heard him call out two or three times, "Jump over the bar and break the bottle," or words to that effect; or "Come over the bar and break the bottle"; the idea was, of course, that he was calling to somebody on the outside of the bar to destroy the evidence.

Mr. MOORE.—I move that be stricken out, after the word "idea."

The COURT.—That may go out.

Mr. DISKIN.—No objection.

The COURT.—Just the last part of it, the idea.

Mr. DISKIN.—(Q.) Did you examine that hole?

A. Yes, sir.

Q. How large a hole was it?

A. Oh, I should judge around ten inches square, something in that nature.

Q. And where was it in reference to the drain-board?

A. Oh, the drain-board, right directly—in close proximity to the drain-board; I would not like to say as to the number of [64] inches, or anything of that nature; the only time I ever saw it was that

(Testimony of P. Nash.)

night; I didn't measure it with a tape-line, or anything of that kind.

Q. Did you make any investigation of the cellar or basement? A. I did.

Q. What, if anything, did you find in this hole?

A. Directly under this hole was a locked compartment or room, possibly eight or ten feet square, with a padlocked door; the defendant opened this door with his key, and in this compartment was this pile of rocks directly under the hole.

Q. What became of the bottle, Mr. Nash, which you had testified to, or saw in the defendant's premises?

A. I took it in my possession; sealed it at the police station, put the seal on it and labeled it, and then delivered it personally to Professor Dinsmore that evening.

Q. Prior to the time you took the bottle and delivered it to Professor Dinsmore, was it always in your possession?

A. Either in my possession, or Mr. Brown's.

Q. Would you be able to identify the bottle?

A. I would.

Q. Will you examine that bottle, and its contents? (Hands to witness.)

A. That is the same bottle, with my writing on it, on the label, with my initials and Mr. Brown's initials. I know it by the label; know it also by the fact of this seal that was placed on it that evening; the wax seal we placed on it underneath Professor Dinsmore's seal.

(Testimony of P. Nash.)

Q. From the time you received that bottle until you delivered it to Professor Dinsmore, did you put anything in the bottle? A. I did not. [65]

Q. And the substance that was in the bottle at the time you seized it and at the time you delivered it to Professor Dinsmore was absolutely the same?

A. Absolutely. I did taste the liquor in the bottle, I think it was in the police station; but at no time had the bottle been out of our custody. I tasted it up there; it was liquor.

Q. You are familiar with the taste of liquor?

A. I am.

Q. From the examination you made of the contents of this bottle, can you say whether this was liquor, or not?

A. I can swear that is some sort of whisky.

Mr. DISKIN.—I offer the bottle in evidence.

Mr. MOORE.—Object on the same grounds we have heretofore imposed to all this line of testimony, if the Court please.

The COURT.—It will be the same ruling and the same exception.

Mr. DISKIN.—Cross-examine.

(The bottle is marked Plaintiff's Exhibit No. 1.)

(A short recess is taken at this time.)

Cross-examination.

Mr. MOORE.—(Q.) Mr. Nash, on the date mentioned in April when you went into the premises of Mr. Bachenberg, you were a Federal officer?

A. Yes, sir.

(Testimony of P. Nash.)

Q. And one of the Federal prohibition enforcement officers? A. Yes, sir.

Q. Who else was with you at that time?

A. Mr. Brown.

Q. Any one else?

A. Oh, we had a couple of local men went in behind us to shoo the crowd away if they got too thick. [66]

Q. It was about eight o'clock at night when you went there on that date, was it?

A. Seven-fifty-five, to be exact.

Q. Seven-fifty-five; it was after dark?

A. Yes.

Q. You had a search-warrant in your possession, did you? A. I did.

Q. And you secured that from Mrs. Anna M. Warren, United States Commissioner? A. I did.

Q. I show you, Mr. Nash, a document on which your name appears on the back. "Reno, Nevada, April 10, 1921," on the back, and the signature of Mrs. Anna M. Warren appears on the body of it, and the head of the paper is entitled "Search-warrant"; I ask you to state if that is the instrument you had with you.

A. This is the instrument, with my return on the back.

Q. That is the one you had with you? A. Yes.

Q. And the only one? A. I had a copy of it.

Q. But that is the original? A. Yes.

Q. When you went into the premises, and before you and Mr. Brown leaped over the bar, as you

(Testimony of P. Nash.)

have stated, did you inform Mr. Bachenberg that you had a search-warrant?

A. No, sir, no time to do anything of that sort.

Mr. MOORE.—I move that be stricken out. Just answer my question.

The COURT.—That may go out; but he will have the privilege of making an explanation why he didn't.

Mr. MOORE.—Very well.

Q. Before Mr. Brown seized Mr. Bachenberg, behind the bar, did you announce to him that you had a search-warrant to search his premises?

A. No, I don't believe that I announced to Mr. Bachenberg that [67] I had a warrant during the time of the struggle.

Q. And you did not announce to him that you had a warrant until after you had picked up the bottle, did you?

A. No, I did not; in fact, I didn't give him the warrant for quite a little while afterwards; he recognized—do you want me to go ahead and explain about this warrant business?

Q. We will wait for that. If the Court permits you to make an explanation of that later on, we will wait for that. Now, Mr. Nash, had you ever been in the premises before, since Mr. Bachenberg has been there?

A. I am not positive. I may have been, I don't remember.

Q. Had you ever been behind that bar before?

(Testimony of P. Nash.)

A. No.

Q. And the hole that you speak of there, you discovered during the time you were behind the bar, and at the time you seized the bottle that has been presented here?

A. Well, you might call it discovered; I knew it was there.

Q. You had never been there?

A. No. There is other ways of knowing besides seeing it, isn't there?

Q. Of your own actual knowledge. You knew it was there; you mean, don't you, somebody told you it was there?

A. Put it that way if you like.

Q. Is not that a fact, that somebody told you it was there?

A. It is a fact my knowledge was sufficiently correct that the hole was there, and I have testified to the hole being there.

Q. Will you answer my question, please, Mr. Nash? A. All right.

Q. Did you have any other knowledge of there being a hole in that floor, except what some other person had told you? [68]

A. No, I never saw the hole before I went over the bar.

Q. And you had prior to that time, had you—

The COURT.—I don't know about going into this thing. I have already pronounced that search-warrant valid; and if there is any mistake, it is my

(Testimony of P. Nash.)

mistake, and not a matter that the jury can pass on now.

Mr. MOORE.—I am quite well aware of that fact, if the Court please; and I will state clearly that the only purpose I have in going into this matter at this time, is for the purpose of my record, and as the basis, further, of making a motion in a few minutes, after I have completed Mr. Nash's cross-examination. I will state to your Honor, so it will save time—I don't think it will prejudice the jury at all—that the question I wish to ask him is as to whether or not this other instrument I hold is the affidavit that he made before Mrs. Warren, which is the basis of this search-warrant, and whether or not it is the only affidavit that he made.

The COURT.—You brought this matter up on motion, and the petition was filed, was it not? At any rate, the proceeding was brought before me, and you had ample opportunity then to introduce any evidence you wished. I passed on the matter, and held that the warrant was good. Now, if the testimony is introduced before the jury, what shall I instruct the jury? Shall I instruct them they are now to pass on the same question I have already passed on? Are they to determine whether this is a valid warrant or not, and whether there was probable cause? Under any theory of the case I don't think that can come before the jury at this time; and, furthermore, under the Weeks case [69] and the Adams case, it is hardly proper to stop in the course of a trial to determine whether

(Testimony of P. Nash.)

the search-warrant is regular or not, particularly after the matter has been gone into before the trial, and counsel have had opportunity to have it determined.

Mr. MOORE.—As I stated, the only purpose of this cross-examination was for the basis of a motion, which is to strike the testimony of both these witnesses from the record, and all of it, relative to the search and seizure made there.

The COURT.—I don't think I shall permit it now. You have had your opportunity already, and I do not think we can stop to go into those matters now.

Mr. MOORE.—We reserve an exception to the Court's ruling.

The COURT.—You may have the exception. If this were the only case where that question would come up, possibly I would permit it, but there are a great many cases of this kind; and if the question is to be tried once before the Judge and another time before the jury, it is going to take a great deal of time, and I do not like to set the precedent. Counsel will always have ample opportunity before the trial to raise all those questions, and they can be passed on by the Court. The question has been raised already; it is one purely for the Judge to pass on, and not for the jury, and the rule hereafter will be that all questions of that kind must be disposed of before the trial.

Mr. MOORE.—Well, I will state to the Court,

(Testimony of P. Nash.)

that the Court has disposed of them with the exception of this one.

The COURT.—You had ample opportunity to bring it up before.

Mr. MOORE.—I could not bring it up on motion to strike the testimony out. [70]

The COURT.—You have had ample opportunity to bring out all these facts, every one of them, on the question as to whether there was probable cause or not. I however, do not wish to be understood as saying that the motion and the papers that were presented were sufficient to bring up all those questions, but there was no reason why you should not have brought them all up.

Mr. MOORE.—I think that is all.

Redirect Examination.

Mr. DISKIN.—(Q.) Why didn't you present your search-warrant to Mr. Bachenberg prior to your going over the bar?

Mr. MOORE.—If the Court please, I object to the question as not proper cross-examination, and it is irrelevant at this time.

The COURT.—The objection will be overruled.

Mr. MOORE.—Give us the benefit of an exception.

WITNESS.—I had no opportunity to do so. To present a search-warrant it is necessary that the man will take it; I can't pass the search-warrant through the air to him, when he is running.

Mr. DISKIN.—(Q.) When you first saw Mr. Bachenberg on this occasion what was he doing?

(Testimony of P. Nash.)

A. At the very instant that we entered the door, before he turned his face in our direction, he was standing at the upper end of the bar serving a drink, but as soon as Mr. Brown and myself came inside, he left his position and started running down the length of the bar on the inside; and then the two struggles that were spoken of previously took place. As soon as the second struggle was over and Mr. Bachenberg rose to his feet, I told him I had a warrant; he says, "I know that," he says, "I know you, and you would not be here without a warrant," or words to that effect. [71] I said, "All right then." Then we went right ahead. I told him I would give him a copy of it, and I also told him I would give him a receipt for the liquor that we seized; I did before we parted company, but I didn't give him a receipt behind the bar for the liquor, because of the fact we were not through with our search; we went into the cellar and spent fifteen minutes down there. Before we parted company, though, I gave him a copy of the warrant, and also gave him a receipt for the liquor seized.

Q. In the conversation which you had with Mr. Bachenberg, did he state anything with reference to whether or not he knew you?

A. He said he knew me, yes, knew who I was. I judged from what he said he must have known me, because the first thing he said was "I know who you are; that is all right"; that is the way I think he put the answer to my statement that I was an

(Testimony of P. Nash.)

officer with a warrant; he says, "I know who you are, and that is all right.

Mr. DISKIN.—I think that is all.

Mr. MOORE.—Now, if the Court please, in order to have my record complete as I view it, I move that the testimony of Mr. Brown and Mr. Nash relative to what occurred in the premises this evening at the time they made the search be stricken from the record, for the reason it now appears that it was secured in an unlawful and illegal manner, basing my motion upon the files and records in this case, and upon the testimony now given by the officers.

The COURT.—The motion is overruled, and you may have an exception.

Mr. MOORE.—We note an exception. [72]

Testimony of S. C. Dinsmore, for the Government.

S. C. DINSMORE, called as a witness on behalf of the Government, after being sworn, testified as follows:

Direct Examination by Mr. DISKIN.

Q. What is your full name, Professor?

A. S. C. Dinsmore.

Mr. DISKIN.—Do you admit his qualifications?

Mr. MOORE.—Yes, as a chemist.

Mr. DISKIN.—(Q.) I hand you Government's Exhibit Number One, Professor; will you examine that bottle and its contents? (Hands to witness.) Did you ever see that before?

A. Yes, sir.

(Testimony of S. C. Dinsmore.)

Q. When? A. I saw it on April 9th.

Q. 1921? A. 1921.

Q. And from whose custody did you receive it?

A. I received it from—

Mr. MOORE.—Just a moment. If the Court please, I object to any testimony from this witness relative from whom he received that bottle, or as to what he did with it, or in any connection, basing it upon the motions and objections heretofore made.

The COURT.—It will be the same ruling and same objection. Proceed.

WITNESS.—I received it from Mr. Nash.

Mr. DISKIN.—(Q.) Did you thereafter make any investigation or analysis of the contents of that bottle?

A. I did.

Q. What did your examination disclose as to the contents of that bottle?

A. It showed that it was an alcoholic beverage containing 41.9 per cent alcohol.

Q. From your examination and analysis of the content of that bottle, would you say whether or not the content was fit for use [73] as a beverage?

A. I would say that it was.

Mr. DISKIN.—Cross-examine.

Mr. MOORE.—No questions.

Mr. DISKIN.—That is all, Professor. The Government rests.

Mr. MOORE.—We have no testimony to offer, if the Court please.

After argument to the jury by counsel for the Government, the Court instructs the jury as follows:

Instructions of Court to the Jury.

The COURT.—Gentlemen, there is little necessity for any instructions in this case. The statute makes it a crime to have in one's possession intoxicating liquor. Of course there are exceptions to that rule, but this is not one of the exceptions. It is permissible for one to have intoxicating liquor in his private home, provided it is occupied by him as a dwelling and the liquor is there for his own use, and for the use of his family and his guests, and was lawfully obtained; but there is no testimony that this is a private dwelling, or that it is a home. In any event, if whiskey is found in the possession of an individual, the burden is on him to prove that it was lawfully acquired, that he had acquired it before the law went into effect, and had it in his own home and for his own use, and for the use of his family and his *bona fide* guests. Then it would be lawful; but there is nothing of that kind shown here. The evidence all shows it was in a soft drink establishment, and not a dwelling-house. What its purpose was you can infer from the circumstances, but the presumption under the statute is, that if one has possession of intoxicating liquor under such circumstances, the possession is for the purpose of barter and sale, and in violation of [74] the law; and if it is not so, the burden is on the defendant to establish that fact.

The statute defines intoxicating liquor as liquor fit for a beverage, which contains one-half of one per cent, or more, of alcohol by volume. You have heard the testimony of Professor Dinsmore on that point; it has not been disputed.

The defendant has not appeared in this case as a witness. You cannot consider that fact against him.

The burden is on the Government to establish its case within the lines I have given you, by evidence introduced on this stand. The defendant has a right to rely on that rule, and on the presumption that he is innocent until his guilt is proven beyond a reasonable doubt.

A reasonable doubt is one based on reason; it is a substantial doubt; it is not a possibility that his guilt has not been proven, but it is such a doubt as would govern one in the more weighty affairs of life.

Much has been said about the search-warrant. The search-warrant, and its legality, is a matter for the Court to determine, and I have already determined it. If I have made a mistake, it is my mistake, and one for which the jury is not responsible; it is a question which the jury cannot decide, it is a question solely for the Court.

You are to take the law as I give it to you, and you are to find the facts from the evidence as it is given from the witness-stand. You are not bound to accept any of the statements of fact which I recite, except as they are approved by your judgment.

**Certificate of Reporter U. S. District Court to
Transcript of Record and Proceedings.**

I, A. F. Torreyson, Reporter in the United States District Court for the District of Nevada, DO HEREBY CERTIFY:

That as such reporter I took *verbatim* shorthand notes of the testimony and proceedings in said court on the trial of the case of United States of America, Plaintiff, vs. J. H. Bachenberg, Defendant, on May 7th, 1921, and that the foregoing pages from 1 to 25, both inclusive, contain a full, true and correct transcription of my shorthand notes of the testimony given and proceedings had on said trial.

Dated May 23d, 1921.

A. F. TORREYSON.

[Endorsed]: In the District Court of the United States, in and for the District of Nevada. Honorable E. S. Farrington, Judge. United States of America, Plaintiff, vs. J. H. Bachenberg, Defendant. No. 5401. Transcript of Testimony. Appearances: Mr. M. A. Diskin, Assistant United States Attorney, for Plaintiff. Messrs. Moore & McIntosh, for Defendant.

WITNESSES:

	Direct	Cross	Redirect
Brown, H. P.....	3	6	9
Nash, P.	10	15	20
Dinsmore, S. C.			22

Filed May 24, 1921. E. O. Patterson, Clerk. [76]

In the District Court of the United States for the
District of Nevada.

**Certificate of Clerk U. S. District Court to Trans-
script of Record.**

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. G. H. Bachenberg, Defendant, said case being No. 5401 on the docket of said court.

I further certify that the attached transcript, consisting of 78 typewritten pages numbered from 1 to 78, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to \$18.25, has been paid to me by Mr. M. B. Moore, attorney for the defendant in the above-entitled cause. [77]

And I further certify that the original writ of

error, and the original citation, issued in this cause are hereto attached.

WITNESS my hand and the seal of said United States District Court this 22d day of July, A. D. 1921.

[Seal] E. O. PATTERSON,
Clerk U. S. District Court, District of Nevada.

[78]

Letter from U. S. District Attorney Wm. Woodburn to Hon. E. S. Farrington.

Time and Place of Holding Court: At Carson City
—First Mondays in February, May and October.

**DEPARTMENT OF JUSTICE.
OFFICE OF THE UNITED STATES
ATTORNEY.**

DISTRICT OF NEVADA.

Sept. 23, 1921.

Honorable E. S. Farrington,
U. S. District Judge,
Carson City, Nevada.

My dear Judge Farrington:

Referring to your letter of the 13th inst., you are advised that it is agreeable to me that you certify the Bill of Exceptions in the cases of the United States vs. Vachina and United States vs. Bachenberg.

As to the trial of Davis during the latter part of this month it is impossible, so far as my engagements are concerned, to arrange.

I expect to be in Carson in a day or two and will consult with you in reference to this matter.

Very sincerely yours,

WM. WOODBURN,

W: W.

[Endorsed]: Filed Sept. 27, 1921. E. O. Paterson, Clerk, U. S. Dist. Court, Dist., Nevada. By _____, Deputy Clerk. [79]

In the District Court of the United States, in and for the District of Nevada.

INDICTMENT FOR VIOLATION OF NATIONAL PROHIBITION ACT.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

United States of America,
District of Nevada,—ss.

Certificate of Judge to Bill of Exceptions.

The foregoing was prepared and submitted to me as a bill of exceptions by the defendant Sept. 13th, 1921, and I do now, in pursuance of the foregoing consent of Wm. Woodburn, U. S. District Attorney for the District of Nevada, certify that it is full, true and correct, and has been settled and allowed and is made a part of the record in this cause.

Done in open court this 27th day of September, 1921.

E. S. FARRINGTON,

Judge. [80]

In the District Court of the United States for the District of Nevada.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. G. H. Bachenberg, Defendant, said case being No. 5401 on the docket of said court.

I further certify that the attached transcript, consisting of 82 typewritten pages numbered from 1 to 82, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to \$19.50, has been paid to me by Mr. M. B. Moore, attorney for the defendant in the above-entitled cause. [81]

And I further certify that the original writ of error, and the original citation, issued in this cause are hereto attached.

Witness my hand and the seal of said United States District Court this 27th day of September, A. D. 1921.

[Seal] E. O. PATTERSON,
Clerk U. S. District Court, District of Nevada.

[82]

In the United States District Court for the District
of Nevada.

No. 5401.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

G. H. BACHENBERG,
Defendant.

Writ of Error (Original).

United States of America,—ss.

The President of the United States, to the Honorable the Judge of the District Court of the United States of America, in and for the District of Nevada, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in

the said District Court before you, or some of you, wherein the United States is plaintiff and G. H. Bachenberg is defendant, a manifest error hath happened, to the great damage of the said G. H. Bachenberg as by the indictment in said cause and the record of proceedings therein appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, together with this writ, so that you have the same in the [83] said United States Circuit Court of Appeals at San Francisco, California, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable E. S. FARRINGTON, Judge of the said United States District Court of the District of Nevada, the 6th day of June, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal] E. O. PATTERSON,
Clerk of the United States District Court for the
District of Nevada.

Allowed by:

E. S. FARRINGTON. [84]

[Endorsed]: No. 5401. In the United States District Court for the District of Nevada. United States of America, Plaintiff, vs. J. H. Bachenberg, Defendant. Writ of Error. Filed June 6, 1921. E. O. Patterson, Clerk. [85]

In the District Court of the United States, in and for the District of Nevada.

No. 5401.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. H. BACHENBERG,

Defendant.

Citation on Writ of Error (Original).

The United States of America,—ss.

The President of the United States to the United States of America, GREETING:

TO THE UNITED STATES OF AMERICA:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within 30 days from the date of this writ, pursuant to a writ of error duly allowed by the District Court of the United States in and for the District of Nevada and filed in the clerk's office of said court on the 6th day of June, A. D. 1921, in a cause wherein G. H. Bachenberg is appellant and you are appellee, to show

cause, if any, why the judgment and decree rendered against the said appellant as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS the Honorable E. S. FARRINGTON, Judge of the District Court of the United States, in and for the District of Nevada, this 6th day of June, A. D. 1921, and of the Independence of the United States, the one hundred and forty-fifth.

E. S. FARRINGTON,

District Judge. [86]

[Seal]

Attest: E. O. PATTERSON,

Clerk.

By _____,

Deputy.

Service of the within citation and receipt of a copy is hereby admitted this 6th day of June, A. D. 1921.

U. S. Attorney, District of Nevada.

[87]

[Endorsed]: No. 5401. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. H. Bachenberg, Defendant. Citation. Filed June 6, 1921. E. O. Patterson, Clerk. [88]

[Endorsed]: No. 3723. United States Circuit Court of Appeals for the Ninth Circuit. G. H. Bachenberg, Plaintiff in Error, vs. The United

States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed July 23, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.